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Lolita Pentecost v. M.W. Harward, And John Doe I-ii : Brief of Appellant

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IN THE SUPREME COURT OF THE STATE OF UTAH

LOLITA PENTECOST,

Plaintiff/Appellant,

VS.

M.W. HARWARD, and JOHN
DOE I-III,

Defendants/Respondents.)

Civil No. 62246

BRIEF OF APPELLANT

Appeal from the Judgment of the Fourth
District Court for Utah County
Honorable J. Robert Bullock, Judge

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Clark, Supreme Court, Utah

LOLITA PENTECOST,
Plaintiff/Appellant,
vs.
M.W. HARWARD, and JOHN
DOE I-III,
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CASES CITED

<u>Bullock v. Deseret Dodge Truck Center,</u>	354 P.2d 559. . . .
<u>Duplar v. Yates,</u>	351 P.2d 624.
<u>In re Williams' Estates,</u>	348 P.2d 683
<u>Rich v. McGovern,</u>	551 P.2d 1266.
<u>Pace v. Parrish,</u>	247 P.2d 273.

STATUTES CITED

Rule 56(b) Utah Rules of Civil Procedure
Rule 56(c) Utah Rules of Civil Procedure

ISSUE

The sole issue before the Court is whether Summary Judgment can be granted to a party simply on the grounds that no counter-affidavit was attached to the responding party's Memorandum in Opposition to granting of Summary Judgment.

STATEMENT OF FACTS

This action was commenced by Plaintiff/Appellant with Verified Complaint for wrongful eviction and conversion of personal property filed in November of 1982.

Defendant/Respondant answered said complaint denying: of the material allegations of the Verified Complaint.

On January 24, 1983, Defendant/Respondant filed their Motion for Summary Judgment alleging fraud on behalf of Plaintiff/Appellant and stating Defendant/Respondant was an agent.

Plaintiff/Appellant responded on February 2, 1983 refuting to the Verified Complaint which raised substantial and material issues of fact as well as raising the issue of proving "fraud".

The Fourth District Court handed down a judgment on February 23 granting Summary Judgment based on the grounds "...there appearing ...no counter-affidavit to controvert the [affidavit] of M.W. Harward."

Plaintiff/Appellant subsequently filed this appeal.

POINT I

NO AFFIDAVITS ARE REQUIRED UNDER RULE 56

Defendant/Respondant was not required to file an affidavit with their Motion for Summary Judgment:

"A party against whom a claim...is asserted...may...move with or without supporting affidavits for a summary judgment."
Rule 56(b) U.R.C.P.

The Rule further infers that affidavits are not necessary to grant or deny summary judgment:

"The judgment sought shall be rendered...if the pleadings...together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.." Rule 56(c) U.R.C.P. (emphasis added)

POINT II

PLAINTIFF/APPELLANT'S VERIFIED COMPLAINT SERVES AS AN

AFFIDAVIT UNDER RULE 56

Rule 56(e) requires that affidavit "shall be made on personal knowledge...[and] must set forth specific facts showing that there is a genuine issue for trial."

Plaintiff's verification on the Complaint sets forth facts in great detail, including the specific fact that (1) a valid lease was entered into, and (2) certain very specific items were converted by Defendant/Respondant.

The inference that a verified complaint would rise to the level necessary to prevent a Summary Judgment from being granted

is set forth in Dupler v. Yates:

"The record made by the defendant, in support of his motion for summary judgment, controverted the unverified allegations in the plaintiffs' amended complaint and therefore in the absence of counteraffidavits, no genuine issues of material fact were created."

Dupler v. Yates, 351 P.2d 624 at 637

Since the complaint here was verified and the response Defendant/Respondant's Motion specifically made reference to those specific verified facts, a counter-affidavit did exist. The granting of the Summary Judgment was improper.

POINT III

DEFENDANT/APPELLANT'S OWN MOTION IS INSUFFICIENT AS A

MATTER OF LAW

Defendant/Appellant raises the issue of fraud for the first time in the pleadings. Neither his Motion nor the accompanying affidavit set forth the requirements laid down in Pace v. Parrish 247 P.2d 273 and therefore are insufficient to raise the issue let alone be granted summary judgment.

POINT IV

PLAINTIFF/APPELLANT HAS RAISED MATERIAL ISSUES OF FACT

AND LAW

Plaintiff/Appellant's specific facts sworn by her in her complaint and referred to in her response to Defendant/Appellant's Motion, together with the matters of fact present in the case and raised by Defendant/Appellant are

sufficient to defeat a Motion for Summary Judgment:

"A summary judgment is proper only if the pleadings, depositions, affidavits and admissions show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law."

In re Williams' Estates, 10 U.(2d) 83,
348 P.2d 683 emphasis added

Plaintiff/Appellant is further entitled to have the evidence viewed in the light most favorable to her:

"A summary judgment must be supported by evidence, admission and inferences which, when viewed in the light most favorable to the loser,...

Bullock v. Deseret Dodge Truck Center,
11 U.(2d) 1, 354 P.2d 559

Further,

"...the record must be carefully scrutinized to see if that party presents allegations which, if true, would entitle him to judgment; if so, then summary judgment is improper.-

Rich v. McGovern, 551 P.2d 1266

CONCLUSION

Plaintiff/Appellant has set forth specific facts which are in controversy by Defendant/Respondant's own affidavit. These specific facts have been sworn to be Plaintiff/Appellant, under oath, and they thereby are sufficient to defeat Defendant/Respondant's Motion.

Defendant/Respondant has further raised issues of law which are also in controversy and which, as Plaintiff/Appellant alleges, are improperly pleaded.

Therefore, Plaintiff/Appellant is entitled to have the

Summary Judgment against Defendant M.W. Harward set aside and allow her to go forward on her complaint.

DATED this 12th day of May, 1983.


RONALD E. DALBY
Attorney for Plaintiff/Appellant

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Appellant's Brief to Jay Fitt, Attorney for Defendant M.W. Harward, at his offices at 2230 North University Parkway, Suite 3B, Provo, Utah 84604, by first class mail, postage prepaid, this 12th day of May, 1983.



Summary Judgment against Defendant M.W. Harward set aside and allow her to go forward on her complaint.

DATED this 12th day of May, 1983.


RONALD E. DALBY
Attorney for Plaintiff/Appellant

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